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# The Current State of Moral Rights Protection for Visual Artists in the United States

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*by*
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## Introduction

> All great art is the work of the whole living creature, body and soul, and chiefly of the soul.[1]

Congress recently gave statutory force to this statement through the Visual Artists Rights Act of 1990 ("Act").[2] After years of revision and compromise,[3] artists now have both economic and moral rights[4] in their works.

The Visual Artists Rights Act is the United States' first grant of moral rights in federal copyright law.[5] The Act preserves the personal, inalienable rights of the artist in his work, similar to the more extensive protection provided by other countries.[6] Unlike traditional copyright law, which protects transferable economic interests of the copyright owner,[7] moral rights are rooted in the notion that an artist retains a separate, nontransferable, noneconomic interest because the work itself is an extension of his personality.[8] Broadly stated, a moral right is "the right of the creator to create, to present his creation to the public in any de-

1. 135 CONG. REC. E2227-01 (daily ed. June 20, 1989) (statement of Rep. Edward J. Markey introducing a predecessor of the Visual Artists Rights Act to the U.S. House of Representatives, quoting John Ruskin).

2. 17 U.S.C. § 106A (Supp. 1991).

3. According to one commentator, the previous failure to provide for artists' rights "is neither a tribute to nor an indictment of our legal system. The critical inquiry is whether our failure to embrace the doctrine has resulted in inadequate protections for the important interests at stake." Roberta Rosenthal Kwall, *Copyright and Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1, 17 (1985). The overwhelming number of commentators who have studied this question have concluded that the scope of protection in America for the personal rights of creators is insufficient. *Id.* at 17-18.

4. The term "moral right" is derived from the French *droit moral*, which has no precise English equivalent. *Id.* at 3 n.6. One commentator has written, " 'Spiritual', 'non-economic' and 'personal' convey something of the intended meaning" of "moral." SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 456 (1987).

5. Common law doctrines such as breach of contract and unfair competition and statutes such as the Lanham Act have provided extremely limited protection of an author's moral right. *See* Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976) ("Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.").

6. Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 478 (1991).

7. Generally, traditional copyright law consists of the right to prohibit reproduction, derivation, performance, distribution, or display of a protected work. 17 U.S.C. § 106 (1988).

8. "When an artist creates . . . he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones . . . ." Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

sired form or to withhold it, and to demand from everyone respect for his personality as creator and for his works."[9]

Although it represents a landmark for artists' rights, the Act may prove troublesome to interpret. In particular, the preemption provision contains ambiguities that must be addressed in states which currently provide moral rights protection. Exactly how this provision affects rights previously enjoyed by artists is unclear. However, the principles of preemption set forth by the U.S. Supreme Court and the text of the Act suggest a solution. Under the U.S. Constitution, the Act should preempt state law only if an "unyielding national interest" or express statement by Congress would restrict states from enacting laws.[10] In this light, the text of the Act appears to permit many works that are outside of the scope of federal protection to be protected under state moral rights statutes.

This Note will examine this issue in the context of the history and purpose of moral rights. Part I surveys the tradition of artists' rights protection to give an historic framework to the analysis. Part II examines the Act itself. Part III discusses possible interpretations of the Act's preemption provision. Part IV proposes that a faithful interpretation of the text in light of Supreme Court guidelines demonstrates that the Visual Artists Rights Act should permit state law to protect works left unprotected by federal law.

## I
## History and Purpose of Moral Rights

### A. The Tradition of Moral Rights

Before intellectual property laws were instituted, property rights for creators were exclusively noneconomic in nature. Authors and inventors were rewarded with public recognition, not with economic rights.[11] In some societies, these rights were made legally enforceable and evolved into moral rights statutes similar to those recognized by the Act.[12] In those communities, moral rights statutes were in place long before the

9. *Id.* at 558. There is doctrinal disagreement among commentators regarding whether the right is a personal one, or an additional property right. The majority view is that the right is personal. John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 n.5 (1976).

10. Goldstei n v. California, 412 U.S. 546 (1973).

11. Rufus C. King, *The "Moral Rights" of Creators of Intellectual Property*, 9 CARDOZO ARTS & ENT. L.J. 267 (1991).

12. *Id.* at 270.

laws that governed intellectual property's protection of pecuniary interests.[13]

The difference between rights conferred by the traditional economic protection of copyright law and moral rights protection can be illustrated as follows: If an artist sells a sculpture but retains the copyright, the new owner has only the right of possession in the object itself. As copyright owner, the artist may, for example, prohibit unauthorized reproduction of the work.[14] In contrast, moral rights exist independently from copyright ownership and attach solely to the original artifact. Under the Act, an artist may seek an injunction or monetary damages if he can establish that a modification[15] of the work would be prejudicial to his honor[16] or reputation.[17] Furthermore, the owner of a work of art cannot fail to give the artist credit for the original work.[18] The Act extends protection only to the original artifact; reproductions[19] are not protected.[20] For this reason, the copyright holder is free to change a reproduction of the work or juxtapose a copy in any chosen manner.[21]

13. *Id.*; *see supra* note 7.

14. 17 U.S.C. § 106(1) (1988).

15. Modifications that destroy the intrinsic aesthetic quality of the work violate the right of integrity. Kwall, *supra* note 3, at 8-9.

16. "Prejudice to honor" has been defined as the violation of the right to an authentic communication without distortion and the right that the communication be identified as the author's. "The feeling that prompts the rebuke 'Don't put words in my mouth' comes close to capturing the essence of prejudice to 'honor.' " *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1252 Before the Subcomm. on Patents, Copyright and Trademarks of the Comm. of the Judiciary, United States Senate*, 101st Cong., 1st Sess. 32 (1989) [hereinafter *Senate Hearings*] (statement of Prof. Edward Damich).

17. "Reputation" in this context refers to the artistic or professional reputation of the artist and not his general character, as is at issue, for example, in a defamation case. H.R. REP. NO. 514, 101st Cong., 2d Sess. 15 (1990).

18. This illustrates the right of attribution, or "paternity," which protects the author's name and connection as author of a work. Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478 (1968).

19. Although the Visual Artists Rights Act does not protect reproductions, some state statutes do if the work is in view of the public. *See, e.g.*, R.I. GEN. LAWS § 5-62-3 (1987); N.Y. ARTS & CULT. AFF. LAW § 11.01 (McKinney Supp. 1988). For example, New York protects a reproduction which is a "copy, in any medium, of a work of fine art, that is displayed or published under circumstances that, reasonably construed, evinces an intent that it be taken as a representation of a work of fine art as created by the artist." *Id.* § 11.01(16).

20. Congressional history indicates that, "[t]he bill recognizes the special value inherent in the original or limited edition copy of a work of art. The original or few copies with which the artist was most in contact embody the artist's 'personality' far more closely than subsequent mass produced images." H.R. REP. NO. 514, *supra* note 17, at 12 (statement of Prof. Jane Ginsburg). This reflects the concern that the bill "protects the legitimate interests of visual artists without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system." *Id.* at 10.

21. Such juxtaposition might offend an artist. In Morita v. Omni Publications Int'l, 741 F. Supp. 1107 (S.D.N.Y. 1990), the artist designed a glass sculpture to represent his vision of the bombing of Hiroshima. The sculpture, designed to give the appearance of a peace dove

Historically, European nations created the concept of moral rights to protect works of the mind by recognizing that a work embodies an author's personality.[22] Moral rights protect this right of personality by protecting the artist's work, which is seen as "an emanation or manifestation of [the artist's] personality, as his 'spiritual child.' "[23] The importance of personality has been acknowledged in both the German Constitution and the European Declaration of Human Rights. In these documents, the right of personality is elevated to the level of a constitutionally-protected fundamental right.[24] The right of personality includes the right to one's identity, name, reputation, occupation, integrity of person, and privacy.[25] The artist's interest in the right of personality was extended to protect the artist's work, and through the concept of moral rights, the artist has a legally protectible interest if that work is distorted or misrepresented by another.[26]

France has been the innovator of moral rights protection. The French judiciary began enforcement of these rights almost a century ago[27] and subsequently codified them in a civil statute.[28] Because the French perceived works of art as the extension of the artist's personality, "the system was developed under the belief that artwork is different from other forms of property, and that the law of property must be appropriately modified in order to deal with the special considerations raised by works of art."[29]

Because it currently represents the most comprehensive moral rights protection,[30] the French system serves as the model against which other countries' moral rights laws may be compared. The French system consists of three protected rights: 1) *droit d'auteur*, which is analogous to traditional U.S. protection of the copyright owner's economic interests;[31]

shattering in flight, was photographed and then reproduced on the cover of a magazine juxtaposed with a pronuclear caption: "Nuclear Renaissance: Reactors Are Back and the Reactions Are Good." *Id.* at 1109-10. Both the photographer and the sculptor brought suit under section 14.03 of the New York Arts and Cultural Affairs Law. *Id.* at 1114-15. Because the original sculpture and its photograph were not "altered" but merely juxtaposed with the magazine cover's caption, the court found that the New York law was not violated. *Id.*

22. Merryman, *supra* note 9, at 1025.

23. RICKETSON, *supra* note 4, at 456.

24. Merryman, *supra* note 9, at 1025 n.6.

25. *Id.* at 1025.

26. *Id.*

27. Eden v. Whistler, Cass. civ. soc., 1900 Recueil Sirey [S. Jur.] II 490 (Fr.).

28. FRENCH LAW NO. 57-298 ON LITERARY AND ARTISTIC PROPERTY, art. 6, *reprinted in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1987).

29. Merryman, *supra* note 9, at 1037.

30. *See* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988).

31. *See* 17 U.S.C. § 106 (1988).

2) *droit de suite*, which gives artists and authors an economic right to share in the resale royalties of their work;[32] and 3) *droit moral*, or moral right.[33]

*Droit moral* consists of four components: 1) the right of integrity of the work, which protects the work against distortion, dismemberment, or misrepresentation; 2) the right of paternity, which allows an author to claim or disclaim authorship;[34] 3) the right of divulgation, which gives an author the right to decide when and whether a work of art is complete;[35] and 4) the right of an artist to withdraw[36] the work from its owner on payment of an indemnity. *Droit moral* protects the artist's interests in all "works of the mind," including paintings, sculpture, film, choreography, and literary works.[37] The duration of this right is perpetual and passes to the author's heirs at death.[38]

Moral rights were incorporated into the Berne Convention for the Protection of Literary and Artistic Works during its third revision in 1928.[39] The Berne Convention produced a multilateral treaty[40] that set minimum standards for the protection of literary and artistic works for all member states.[41] Legal scholars have noted that because Berne represents a compromise with common law countries that wished to retain

32. *Droit de suite* permits the artist to benefit from the appreciation value of the work by entitling him to a percentage of all subsequent sales. California offers similar benefits under the Artist's Resale Royalty Act, wherein a five percent royalty on each sale of a work is either paid to the artist or put on deposit for benefit of an arts council. CAL. CIV. CODE § 986 (West Supp. 1992); *See* Morseburg v. Babylon, 621 F.2d 972, 976 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980) (California Resale Royalty Act provides artists with an "economic interest of a limited duration in the proceeds of sales other than the initial one.").

33. The focus of the Visual Artists Rights Act is the protection of moral rights. Several excellent articles have been written about the historical roots of moral rights: *see generally* Merryman, *supra* note 9; Kwall, *supra* note 3; and Sarraute, *supra* note 18.

34. FRENCH LAW NO. 57-298, *supra* note 28, provides in relevant part:

> The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person.
>
> It shall be perpetual, inalienable and imprescriptible.
>
> It may be transferred *mortis causa* to the heirs of the author. The exercise of this right may be conferred on a third person by testamentary provisions.

35. *Id.* The parallel doctrine in U.S. copyright law is the right of first publication. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).

36. French case law granting relief on this point is rare. No analogous provision exists in U.S. law.

37. FRENCH LAW NO. 57-298, *supra* note 28.

38. Sarraute, *supra* note 18, at 483.

39. Kwall, *supra* note 3, at 10-11 n.38.

40. Presently, there are 77 members of the Berne union. S. REP. NO. 352, 100th Cong., 2d Sess. 2 (1988).

41. Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967).

some freedom over their moral rights policy, moral rights under the treaty are not as extensive as under French law.[42]

The Berne Convention protects three categories of rights: 1) the right to claim authorship of the work; 2) the right to object to any distortion, mutilation, or other alteration of the work; and 3) the right to object to any other action that would be prejudicial to the author's honor or reputation.[43] The Berne Treaty protects a broad range of works, including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression."[44] The work is protected during the life of the author and for fifty years after his death.[45] Although the United States joined the Berne Convention in 1988 by the enactment of the Berne Implementation Act,[46] Congress specifically provided that U.S. membership did not expand or reduce the moral rights, if any, that were currently available to artists in this country.[47]

42. RICKETSON, *supra* note 4, at 467.

43. Nimmer, *supra* note 41, at 520. Article 6*bis* of the Berne Convention Treaty currently provides:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
>
> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6*bis*, *reprinted in* RICKETSON, *supra* note 4, at 933.

44. Berne Convention, *supra* note 43, art. 2, para. 1, *reprinted in* RICKETSON, *supra* note 4, at 930; *see also* Karen Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873 (1981) (comparing scope of Berne protection against protection afforded by other moral rights systems).

45. If at the time of Berne ratification the country does not extend moral rights protection beyond the life of the author, post-mortem protection is not required. RICKETSON, *supra* note 4, at 327-28.

46. 17 U.S.C. §§ 101, 104, 116, 116A, 205, 301, 401-08, 411, 501, 504 (Supp. 1991).

47. *See* RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 437-38 (1989).

By joining the Berne Convention, the United States increases the number of countries with which it enjoys copyright reciprocity. Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for the Authors' Moral Right?*, 68 N.C. L. REV. 363, 366 (1990). Although a U.S. citizen could previously "backdoor" protection by publishing

### B. The Rationale for Moral Rights Protection

The Visual Artists Rights Act of 1990 represents a landmark development in American intellectual property law. Although artists in the United States have created for over two centuries without its protection, the Act fills a perceived need. As artist Richard Serra stated after an unsuccessful legal battle to prevent the destruction of his site-specific work, "[t]he Government has to learn that art is not property."[48] Property law in the traditional sense fails to protect the very thing that makes the artifact valuable: the expression of the artist as embodied in the work.[49]

According to legal scholar John Merryman, moral rights protection serves "the interest in seeing or preserving the opportunity to see the work as the artist intended it, undistorted and 'unimproved' by the unilateral actions of others, even those with the best intentions and the most impressive credentials."[50] Merryman states that "art is an aspect to our present culture and our history; it helps tells us who we are and where we came from. To revise, censor, or improve the work is to falsify a piece of that culture."[51]

Professor Ginsburg adds that the Act answers questions regarding the credibility of the United States as a member of the Berne Convention.[52] Ginsburg states that some Berne unionists perceived the 1988 Berne Implementation Act as inadequate and expressed doubts regarding the United States' commitment to moral rights.[53] Once adopted, the Act represented at least some level of commitment of the United States to its

simultaneously in a Berne member country, the process is often considered impracticable. *Id.* at 366.

United States membership in Berne, which has been debated for over 100 years, has been controversial. Although some argue that the advantage of international copyright reciprocity justifies U.S. membership, others state that the burdens of Berne adherence are not outweighed by any true practical advantage. *See* Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 71, 105, 119-18 (1988). For example, Oman asserts that the modifications that must be made in U.S. law in order to adhere to Berne would lead to drastic, unnecessary changes that would upset business relations between owners and users of copyrighted works. *Id.* at 116. Further, Oman points out that enforcement under Berne has been lax. *Id.* at 115.

48. Richard Lacayo, *The "Moral Rights" of Artists*, TIME, Mar. 14, 1988, at 59.

49. *See* discussion *infra* at part I.C.

50. Merryman, *supra* note 9, at 1030. In this same vein, Sen. Edward Kennedy quoted Katherine Anne Porter's words when proposing the bill to the Senate: "The arts live continuously. They outlive governments and creeds and societies, even the very civilizations that produce them. . . . They are what we find again when the ruins are cleared away." 136 CONG. REC. S17574 (daily ed. Oct. 7, 1990).

51. Merryman, *supra* note 9, at 1031.

52. Ginsburg, *supra* note 6, at 478-79.

53. *Id.*

Berne obligations.[54] Ginsburg argues that the Act is a necessary "first step" in the process of Berne compliance.[55]

Additionally, substantial evidence indicated that there was a significant need for such protection.[56] The 1976 Copyright Act[57] was primarily intended to protect the marketplace by preventing economic exploitation of original ideas. In contrast, an artist, who will generally encourage others to share ideas and is principally interested in the physical artwork itself, had no protection over her works under the 1976 Act.[58] Moral rights protection was the sole means to protect the physical "work of art" and the reason why the visual arts were the appropriate starting point: the goal of the artistic process is to make a work that embodies an artist's unique thought.[59] Even subtle modification of the

54. *Id.* at 479. The United States would be subject to repercussions of nonadherence to the Berne Convention including criticism by member nations or trial before the International Court of Justice. Another likely source of enforcement is the U.S. court system. Oman, *supra* note 47, at 116 ("The United States, as a people, respects its laws, and relies upon the vigilance of its courts to enforce its treaty obligations.").

If it chose to withdraw from the Berne Convention, the United States would lose significant multilateral copyright protection under the Universal Copyright Convention. *Id.* at 118.

55. Ginsburg, *supra* note 6, at 497. Congress, however, has determined that U.S. law prior to the Act complied with Berne requirements and that the Act merely brought "U.S. law into greater harmony with laws of other Berne countries." H.R. REP. NO. 514, *supra* note 17, at 7-8, 10. Rep. Robert Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, stated, "While this title is not necessary for this country's adherence to the Berne Convention, . . . it certainly strengthens our commitment to that convention." 136 CONG. REC. H13313 (daily ed. Oct. 27, 1990).

56. As one artist testified before Congress:

> The Visual Artists Rights Act is of the utmost importance to professional artists who build their future on the integrity and authenticity of [art] in public and private collections and to the public for preserving its cultural legacy. . . . Artists must sustain the belief in the importance of their work if they are to do their best. If there exists the real possibility that the fruits of this effort will be destroyed after a mere ten to twenty years the incentive to excel is diminished and replaced with purely profit motivation.

H.R. REP. NO. 514, *supra* note 17, at 6 (statement of artist Weltzin Blix).

A California attorney estimates that 100 artists per year call her law firm requesting information about rights in their work after its sale. *Senate Hearings, supra* note 16, at 140 (statement of Ms. Linda Cawley). Artist Tom Van Sant also testified that, "I don't know an artist that hasn't suffered from the loss of work at one stage or another in their careers [sic]. They have long careers, and some of our major works in California have been lost throughout the years." *Id.* at 143.

57. 17 U.S.C. § 102 (1988).

58. Ginsburg, *supra* note 6, at 478-79.

59. Professor Ginsburg has stated:

> [T]he physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies. Were the original defaced or destroyed, we would still have copies, we would all know what the work looked like, but, I believe, we would all agree that the original's loss deprives us of something uniquely valuable.

H.R. REP. NO. 514, *supra* note 17, at 12.

work, which embodies this unique thought, destroys the artist's message.[60] Thus, moral rights legislation was seen as important for the protection of artists, the creative process, and the role that artists play in American culture.[61]

### C. The Need for Moral Rights Legislation

Until the passage of the Visual Artists Rights Act of 1990, no national system of moral rights protection existed.[62] Although a few recent state statutes were enacted,[63] works of art were treated as any other object of property.[64] Creators of works were required to find alternative protections for their interests under such doctrines as unfair competition, breach of contract, defamation, invasion of privacy,[65] and under statutes such as the Lanham Act.[66] For the most part, this was not a satisfactory

60. Professor Damich, in his statement to the Subcommittee on Patents, Copyrights and Trademarks, said:

> The artistically creative act is a communication to the public of the personality of the artist. Not only should she have the right to control the time, manner, and circumstances of this communication, but also, since it is a continuing communication, the artist has a right that it be authentic and that it be identified as *her* communication. Distorting this communication may cause people to think less of the artist, but even if they think better of her, the artist has sustained an injury to her personality.

*Senate Hearings*, *supra* note 16, at 32.

61. Rep. Markey, in his introductory statement to the House, stated:

> Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.

H.R. REP. NO. 514, *supra* note 17, at 6.

62. *See* discussion *supra* at part I.A.

63. Eric M. Brooks, *"Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Berne Adherence to the Berne Convention*, 77 CAL. L. REV. 1431, 1461 (1989).

64. Merryman, *supra* note 9, at 1037. This commentator has further stated that:

> The underdeveloped state of our law is . . . not surprising. The moral right of the artist is a relatively recent growth in France, where it has had its principal development. By the time the moral right began to develop, French art had been of world importance for nearly a century. By comparison, American art has achieved international recognition only in the last two decades; what has been rather lyrically called "the triumph of American art" is a very recent phenomenon. Legal change usually lags behind social and cultural change.

*Id.* at 1042.

65. Kwall, *supra* note 3, at 18.

66. *See, e.g.*, Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981); Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976); Wildlife Int'l, Inc. v. Clements, 591 F. Supp. 1542, 1548 (S.D. Oh. 1984); Follett v. New Am. Library, 497 F. Supp. 304 (S.D.N.Y. 1980).

The purpose of the Lanham Act is to protect "consumers and competitors from a wide variety of misrepresentations of products and services in commerce." Allen v. National Video, Inc., 610 F. Supp. 612, 625 (S.D.N.Y. 1985). The Act prohibits use in connection with goods or services of false or misleading representations in, for example, incidents of product imitation, misrepresentation, and misappropriation.

solution. Since the creator had to force a moral rights claim into a cause of action intended to apply to different circumstances, resulting obstacles often precluded recovery.[67]

For example, in *Wojnarowicz v. American Family Association*,[68] multimedia artist David Wojnarowicz brought suit under the Lanham Act after the American Family Association published and distributed pamphlets containing fragments of the artist's collages that depicted explicit sexual acts. The pamphlets were published in an effort to stop National Endowment for the Arts funding for such works.[69] The court found that "[b]y excising and reproducing only small portions of plaintiff's work, defendants have largely reduced plaintiff's multi-imaged works of art to solely sexual images, devoid of any political and artistic context."[70] Nonetheless, because application of the Lanham Act is traditionally limited to commercial practices, and the pamphlet could not be characterized as the "advertising or promotion" of goods or services, the plaintiff was denied recovery.[71]

Furthermore, a claim under the Lanham Act can only succeed where an artist's name has a substantial secondary meaning.[72] Thus, an emerging artist who had not yet built a reputation would have been unable to seek protection under this statute. The Lanham Act would not prevent the loss of the works of many artists who had failed to achieve eminence at the time the artwork was modified or destroyed.

Remedy under contract law was similarly unsatisfactory. Although courts have urged that artists contract individually for moral rights,[73] generally artists do not execute formal agreements on the sale of their work.[74] Nor is the artist, particularly when young or unknown, in a very

67. Kwall, *supra* note 3, at 23.

68. 745 F. Supp. 130 (S.D.N.Y. 1990).

69. *Id.* at 133-34.

70. *Id.* at 138.

71. *Id.* at 142. However, the plaintiff succeeded in showing a moral rights violation under the New York Authorship Rights Act. *Id.* at 141.

72. Susan L. Solomon, Comment, *Monty Python and the Lanham Act: In Search of a Moral Right*, 30 RUTGERS L. REV. 452, 476 (1977).

73. *See* Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) ("The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract."); Serra v. United States Gen. Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) ("[I]f he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for the sale of his work.").

74. Merryman, *supra* note 9, at 1043; *see also* Robert Projansky, *The Perilous World of Art Law*, JURIS DR., June 1974, at 14, who states:

> The vast majority of artists whose work is sold through dealers, for example, have no written contract with the gallery at all, and most of those few that are in writing are simple letter agreements drafted by laymen. The gallery handles the artist's work,

powerful bargaining position.[75] Even where requested, such contracts in practice are rarely successfully enforced.[76] Additional problems arise when the artwork changes hands. Because no system of public records exists, and it is impractical to attach a notice of restrictions on the artwork without defacing it,[77] there is no method of securely binding successive owners.[78]

The Visual Artists Rights Act, on the other hand, gives artists the right to protect their works after ownership is transferred. The Act also permits artists to maintain their reputation and connection with a work independent of ownership. Unlike other causes of action that could not accommodate this need, protection of moral rights under the Act was an important first step in protecting a work's authorship.

## II
## The Visual Artists Rights Act of 1990

### A. The Right of Attribution

The Visual Artists Rights Act protects two rights of authorship: attribution and integrity.[79] The right of attribution is analogous to the French right of paternity,[80] which grants the author[81] of a work of visual art the rights to: 1) claim authorship of the work;[82] 2) prevent the use of his name on any work of visual art which he did not create; 3) prevent the use of his name as the author of a work of visual art in the event of a

looks after his money, sends his works out of town—sometimes out of the country—all without a word in writing.

75. Merryman, *supra* note 9, at 1043. *But see* King, *supra* note 11, at 295-96 ("In constructing legal rights, we should avoid assumptions about whether one party to a transaction or the other will generally have the better bargaining position. . . . Creators . . . will always have at least one advantage in any negotiation for economic rights, namely, that the property is to some extent unique.").

76. For example, the Museum of Modern Art refused to accept a donated work where the artist insisted on a contract. Martha Buskirk, *Moral Rights: First Step or False Start?*, ART IN AMERICA, July 1991, at 37. The contract reserved the reproduction rights, stipulated that the owner must obtain the artist's consent before works were lent to exhibitions, and required the owner to make the work available on a limited basis for loan to exhibitions at the artist's request. *Id.* This type of contract, known as a Projansky-Sieglaub agreement, is seen as too restrictive for an art exhibitor or purchaser to sign. *See also* JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 152 (1987) (discussing the use of contracts between artists and purchasers).

77. MERRYMAN & ELSEN, *supra* note 76, at 1044.

78. Merryman, *supra* note 9, at 1043-44.

79. 17 U.S.C. § 106A (Supp. 1991).

80. Ginsburg, *supra* note 6, at 478.

81. The term "author" is used in the statute to denote the creator of the work. 17 U.S.C. § 106A(a)(1)(B). Authors of a joint work are co-owners of these rights. 17 U.S.C. § 106A(b).

82. This right includes the right to publish anonymously or under a pseudonym. H.R. REP. NO 514, *supra* note 17, at 14.

distortion, mutilation, or other modification which would be prejudicial to his or her honor or reputation.[83]

For example, an artist whose sculpture has been altered may seek an injunction to have his name removed from the work if he can show prejudice to his honor or reputation.[84] However, the Act does not define "prejudice." The Committee on the Judiciary ("Committee") "believes that the best approach . . . is to focus on the artistic or professional honor or reputation as embodied in the work that is protected."[85] However, if it is generally agreed among experts that the modification is an aesthetic improvement, there may be no "prejudice" in the required sense. Similarly, this language appears to foreclose recovery for modifications that appear slight to the viewer, but trouble the artist greatly.[86]

The restriction that modifications be demonstrably prejudicial to the artist's honor or reputation, which does not have a civil law counterpart, appears to ignore a basic premise of the artistic process. That is, the artist strives to make a finished work which embodies or illustrates an idea. Any change to the finished work alters the communication of that idea. Once a work leaves the artist's possession, he would lose the ability to deliver his message to all subsequent viewers of the work.[87] This would seem to constitute an injury worthy of permitting an artist to remove his name from a work, regardless of whether the artist's professional reputation is marred.

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83. The terms "honor or reputation" are adopted from the Berne Convention. *See also supra* notes 16-17.

84. 17 U.S.C. § 106A(a)(2).

85. H.R. REP. NO. 514, *supra* note 17, at 15. The Committee further states:

> The trier of fact must examine the way in which a work has been modified and the professional reputation of the author of the work. Rules 701-706 of the Federal Rules of Evidence permit expert testimony on the issue of whether the modification affects the artist's honor or reputation.

*Id.* at 15-16. Generally, if the work is of recognized stature, any modification may establish such harm. *Id.*

86. There are numerous instances where artists have refused to tolerate even slight modifications in their work. For example, the photographer Brett Weston, the son of world-renowned photographer Edward Weston, refused to allow his own negatives to be printed by another, although countless galleries exhibited the work of his father as printed by his brother, Cole Weston. One art dealer stated, "[Brett] had watched the difference between the way Edward worked and how Cole printed the negatives. I think he felt that it may have been a necessary financial inheritance for his father's sons, but the artistic compromise was something he couldn't live with." As a result, Brett Weston destroyed all but twelve of his thousands of negatives, some sixty years work, to avoid posthumous distortion of his work by another printer. Admittedly a purist, Brett Weston has stated, "No one can print another photographer's negatives. It's just too personal. There are infinite choices to make." Suzanne Muchnic, *A Bonfire of the Vanities?*, L.A. TIMES, Dec. 19, 1991, at F1.

87. *See supra* note 16.

### B. The Right of Integrity

Second, the Visual Artists Rights Act protects the right of integrity against unauthorized changes to a work. The artist may obtain either an injunction or monetary damages for the intentional distortion, mutilation, or other modification of the work that would be prejudicial to his honor or reputation.[88] An artist may also seek recovery for destruction of a work regardless of the defendant's scienter if the work is "of recognized stature."[89] Although the Act leaves this term undefined, a work of recognized stature presumably is a work that has achieved some acclaim.

### C. Limitations of the Act

#### *1. Exceptions to the Act*

Significant exceptions to the Act exist. First, modifications to a work resulting from the passage of time or the inherent nature of the materials are not protected.[90] Given the purpose of the Act, this provision should ideally apply only to modifications due to passive aging, not to any attempt to "speed" the aging process. For example, the art critic Clement Greenberg, as executor of artist David Smith's estate, allowed several sculptures to be placed outside and "weather" so that the paint would eventually fade.[91] In Mr. Greenberg's judgment, the result improved the aesthetic quality, and hence the value, of the work. There is evidence which indicates that doing so would have enraged and frustrated the intent of Mr. Smith.[92] Results such as those caused by Mr. Greenberg violate the purpose of the Act.[93]

Another exception to the Act provides that modifications that are the result of conservation or public presentation, including lighting and placement, do not establish a basis for liability.[94] This reflects the view that the Act intended to protect only the single, original work; the artist does not retain control over the environment in which his work is presented.

88. H.R. REP. NO. 514, *supra* note 17, at 22; 17 U.S.C. § 106A (a)(3)(A).

89. 17 U.S.C. § 106A(a)(3)(B). This subsection further provides that no showing of the defendant's state of mind is required to obtain an injunction, but monetary damages are only available if the conduct was intentional or grossly negligent.

90. 17 U.S.C. § 106A(c)(1).

91. *See* Sarah Ann Smith, Note, *The New York Authorship Rights Act*, 70 CORNELL L. REV. 158, 163 (1984).

92. *Id.* at 163.

93. Note that, unless state law provided otherwise, the estate could not recover against Mr. Greenberg in any event because the Act only protects the work during the artist's life. 17 U.S.C. § 106A(d)(1). If such a right were enforceable, however, interests of the artist's survivors, who may want to maximize the work's economic potential, could conflict with the interests of those who would seek to preserve the original work as created by the artist.

94. 17 U.S.C. § 106A(c)(2).

A third exception is that the Act strictly limits protection for reproductions. As an initial matter, an unsigned reproduction is not considered a "work of visual art" for purposes of the Act.[95] For example, a magazine could publish a photograph of a sculpture with a caption offensive to the artist.[96] Only limited editions of two hundred or fewer, signed by the artist and numbered, are protected. Any modification or alteration of a work falling outside this limited scope would not be actionable.[97] Nor could an artist sue to remove his name from a publication that reproduced a work in a manner which distorted it.[98] This may reflect the recognition that the reputation of the artist is most closely connected to an original, or at least signed, piece.

Very broad protection of reproductions arguably violates the first amendment.[99] However, the presentation of a distorted or altered reproduction as the work of the original artist might be considered false, and therefore unprotected, speech.[100] It is unlikely that a distorted reproduction that is not attributable to the original artist would violate that artist's right of personality, and consequently any moral right. Similarly, moral rights statutes do not interfere with the right to comment upon an artist's work. Therefore, it appears that moral rights protection of reproductions is possible without a violation of the first amendment.

### 2. *Scope of Moral Rights Protection Under the Act*

The Act protects only a narrow category of art works in comparison to state laws.[101] The Act creates categories of works based upon various

95. Works of visual art are defined as those "existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author . . . ." 17 U.S.C. § 101.

96. *See supra* note 21.

97. 17 U.S.C. § 106A(c)(3) states that "any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification." *See also* H.R. REP. NO. 514, *supra* note 17, at 17-18. ("[I]mposing liability [where a work is reproduced in a publication] would not further the paramount goal of the legislation: to preserve and protect certain categories of original works of art.").

98. 17 U.S.C. § 106A(c)(3).

99. U.S. CONST. amend. I; *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (deliberate distortion as satire is protected under the first amendment).

100. Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 140 (S.D.N.Y. 1990) (held that the New York Authorship Rights Act for the protection of an author's moral rights does not violate the first amendment either facially or as applied).

101. 17 U.S.C. § 101 provides that the following are protected under the Act:

(1) "a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author . . . ."

(2) "a still photographic image produced for exhibition purposes only, existing in a single copy . . . or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

17 U.S.C. § 101 specifically excludes:

artists' media. At first glance, these categories appear to make the Act easy to interpret and administer. However, some problems may arise. For example, artists often actively attempt to break out of traditional media or to invent new ones. These modern works may be unprotected solely because of their failure to fit within a defined category. Further, some classifications do not assist purchasers of work. For example, only photographs taken "for exhibition purposes" are covered by the Act.[102] Yet photographic artists have created many valuable and highly acclaimed works now considered to be artistic who were motivated originally by the desire to document, advertise, or for purely personal reasons. In any event, a purchaser rarely has notice or evidence of the photographer's purpose when he buys the work. Thus, by narrowing the scope of protected works, the Act threatens to create uncertainty in the art marketplace.

This limitation on the scope of works protected is not justified. The statute is intended to protect the creative personality, which may move from one medium to another without thinking of the legal intricacies involved. Limited categorization is overly restrictive.[103] Legal standards have already been developed to assist courts in defining a "work of fine art."[104] The costs inherent in the legal system will undoubtedly discourage frivolous claims[105] where relief is sought for the destruction of a meritless work, such as an absent-minded doodling or a kindergartner's work. An exclusion for commercial works is sufficient to protect advertisers and publishers.

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(A)(i) "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;"

(ii) "any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;"

(B) "any work made for hire;"

(C) "any work not subject to copyright protection . . . ."

102. *Id.*

103. The Act does not protect applied art, presumably to protect commercial interests. However, depending upon court interpretation, this exclusion may result in the loss or alteration of pieces equally as important as "pure" fine art. *See* Peter H. Karlen, *Moral Rights In California*, 19 SAN DIEGO L. REV. 675, 702 (1982) ("[A]ll useful works which may be feats of craft or engineering skill should not be excepted from the category of *fine art*. To do so 'would exclude the Ghiberti doors of Florence, or the fountains of Paris or Versailles.' The work of fine art . . . appeals primarily to the aesthetic senses even though it can serve a utilitarian or ornamental purpose.") (citation omitted).

104. *See generally* Leonard D. Duboff, *What Is Art? Toward A Legal Definition*, 12 HASTINGS COMM/ENT L.J. 303 (1990).

105. One recent estimate states that a minimum of $2,000-3,000 is required to litigate such claims. Daniel Grant, *Before You Cut Up That Picasso . . .*, WORLD MONITOR, Feb. 1992, at 58-59.

In general, state statutes are more generous in protecting a full range of various media. Pennsylvania is among the states offering the broadest protection: a work in any medium is protected so long as the work is of recognized quality.[106] In New Mexico, any original work of art of recognized quality is protected from alteration or destruction if the work is in public view.[107] Rhode Island protects all original works of visual art of any medium, with the exception of film.[108] Connecticut provides an extensive list of protected media, including masters from which copies of an artistic work can be made.[109]

Some state laws permit recovery in a broader range of circumstances. For example, in California and Pennsylvania, no intentional defacement, alteration, or destruction is allowed regardless of the artist's ability to prove damage to honor or reputation,[110] so long as the work is of recognized quality.[111] Massachusetts goes further by adding a prohibition against acts of gross negligence.[112]

### 3. *Duration of Moral Rights Protection*

Presently, a work created on or after June 1, 1991, is protected for the life of the author.[113] If a work has been created before June 1, 1991, but the title has not yet been transferred, the rights last for the life of the author plus fifty years.[114] This seems insufficient to meet the Act's goal of art preservation. Indeed, one of the most notorious examples of the destruction of artwork would not fall within the present Act: Picasso's

106. PA. STAT. ANN. tit. 73, §§ 2103, 2106 (1991).

107. N.M. STAT. ANN. § 13-4B-3(B) (Michie 1991). A work of fine art is "any original work of visual or graphic art of any media . . . of recognized quality." *Id.* § 13-4B-2(B). Like the U.S. Congress, the New Mexico legislature found that moral rights protection served a twofold purpose: to protect the reputation of the artist, and to preserve the integrity of artistic creations. *Id.* § 13-4B-1.

108. R.I. GEN. LAWS § 5-62-2(e) (Michie 1987). The work is protected against modification, alteration, or defacement if on public display. *Id.* § 5-62-3.

109. CONN. GEN. STAT. ANN. § 42-116s(2) (West Supp. 1991).

110. CAL. CIV. CODE §§ 987-990 (West Supp. 1991); PA. STAT. ANN. tit. 73, §§ 2101-10 (1991).

111. The artist must prove that the work was of "recognized quality." CAL. CIV. CODE § 987(b)(2)(C)(1) (West Supp. 1991); PA. STAT. ANN. tit. 73, §§ 2102, 2104(a), 2106 (1991). The difference between "recognized quality" and "recognized stature" is unclear because no legal standard has been developed for measuring the latter. *See* 17 U.S.C. § 106A(a)(3)(B).

112. MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1991). Some states prohibit acts of gross negligence only if performed by one who "frames, conserves or restores" works of fine art. *See, e.g.*, PA. STAT. ANN. tit. 73, § 2104(b) (1991).

113. Or, in the case of joint authors, until the death of the last surviving author. All rights run until the end of the calendar year in which they would otherwise expire. 17 U.S.C. § 106A(d)(3)-(4).

114. 17 U.S.C. §§ 106, 106A(d), 302. There is longer protection given to a work created, but not sold, in May, 1991, than a work created in June, 1991.

painting "Trois Femmes" was cut into one-inch squares by two art investors and sold as "original Picasso pieces."[115] Because Picasso is no longer living, the investors are free from liability under the Act.

The narrow scope of the Act's protection is contrary to its stated policy of preserving artwork for the future. The Committee states that the Act "recognizes that destruction of works of art has a detrimental effect on the artist's reputation, and that it also represents a loss to society."[116] In light of this concern, it is troubling that the Act extends protection only during the life of the artist.[117] Withdrawing protection after the artist's death does nothing to further society's interest in art work. The Committee states that art preservation is one goal of the Act;[118] however, extending federal protection only during the artist's lifetime casts doubt on the legitimacy of this statement. Perhaps this section's main effect will be to minimize frivolous litigation over minor works.[119]

### D. Other Aspects of the Act

Rights under the Act may not be transferred, but they may be waived. The waiver requirements are strict: the waiver instrument must identify the work and its uses, and must be signed by the author.[120] Be-

115. Grant, *supra* note 105, at 58; *see also* Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM/ENT L.J. 85, 86 (1991).

116. H.R. REP. NO. 514, *supra* note 17, at 16.

117. 17 U.S.C. § 106A(d).

118. H.R. REP. NO. 514, *supra* note 17, at 16 ("The bill furthers the preservation concept and provides the most effective way for the protection of the work by giving the artist the right of integrity and the power to enforce it.").

119. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 29 CATH. L. REV. 945, 954-55 (1990).

120. 17 U.S.C. § 106A(e). The waiver provision has been the subject of considerable controversy. One view is that those most in need of protection, unknown emerging artists, are also the most vulnerable to signing away rights. Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 360 (1989) ("The artist's ability to waive any and all of the protections under the statutes undermines one of the central purposes for their adoption. Whether one views the statutes as protecting artists alone or both artists and the public, waiver is a dagger in the heart of the protection.").

The other view, one ultimately adopted by the Judiciary Subcommittee for incorporation into the Act, is that of Professor Ginsburg:

> Arguably, the best recognition of moral rights would countenance no waivers. This position, however, is probably too extreme for the U.S. system, nor does Berne require it. As a practical matter, moreover, despite their formal prohibition, de facto waivers are likely to occur. The artist is better protected under a regime requiring specificity of waivers than under one where an ideologically pure no-waiver law is rarely in fact observed.

H.R. REP. NO. 514, *supra* note 17, at 18. The House Report states that the Act does not permit blanket waivers, and the waiver is effective only to the specific person to whom it is made. *Id.* at 19. The statute only allows for an express waiver in a written instrument signed by the author, or any one of joint authors. 17 U.S.C. § 106(A)(e).

cause this provision is currently under study by the Register of Copyrights, its future is uncertain.

In addition, Congress modified 17 U.S.C. section 301 to include a provision which controls preemption of state law in relation to the Act.[121] Essentially, it provides that any causes of action commenced after June 1, 1991, concerning equivalent rights granted in the Visual Artists Rights Act are preempted.[122] If, however, state law established rights beyond the life of the author, that protection is not preempted.[123]

## III
## The Problem of Preemption After the Enactment of the Visual Artists Rights Act of 1990

Prior to the Visual Artists Rights Act, eleven states had some form of moral rights protection.[124] The statutes vary in scope, but, in some instances, they give the artist greater protection than does federal law. Courts will be asked to determine whether artists in those states retain state law protection.

### A. The Concept of Federal Copyright Preemption

The federal constitutional system distributes power between two spheres of government: federal and state.[125] Preemption inevitably in-

121. Section 301(f) provides:

(1) On [June 1, 1991], all legal and equitable rights that are equivalent to any of the rights conferred by 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before [June 1, 1991];

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art;

(C) activities violating legal or equitable rights which extend beyond the life of the author.

17 U.S.C. § 301(f) (Supp. 1991).

122. 17 U.S.C. § 301(f)(1) (Supp. 1991).

123. 17 U.S.C. § 301(f)(2)(C) (Supp. 1991).

124. CAL. CIV. CODE §§ 987-90 (West Supp. 1989); CONN. GEN. STAT. ANN. § 42-116t (West Supp. 1991); ILL. ANN. STAT. ch. 121 1/2, para. 1401-08 (Smith-Hurd 1991); LA. REV. STAT. ANN. §§ 2151-56 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1989); N.J. STAT. ANN. § 2A:24A-1 (West 1987); N.M. STAT. ANN. § 13-4B (Michie 1991); N.Y. ARTS & CULT. AFF. LAW §§ 14.01-03 (McKinney 1988); PA. STAT. ANN. tit. 73, §§ 2101-10 (1991); R.I. GEN. LAWS §§ 5-62-2 to -6 (1987).

125. U.S. CONST. amend. X.

volves an examination of this relationship and its resulting tensions. As stated in The Federalist,

> [a]n entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] Convention aims only at a partial union or consolidation, the State governments would clearly retain all of the sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.[126]

Federal preemption under the Constitution is governed by three interactive principles. First, if Congress acts within the authority delegated by the Constitution, its ability to preempt conflicting state law, either completely or partially, flows directly from the substantive source of power coupled with the Supremacy Clause of Article VI.[127] Second, unless Congress either expressly or impliedly occupies an entire field, concurrent power may be exercised by both federal and state authority.[128] Third, exercise of national power on any subject should not bar State action on the same subject unless there is a positive inconsistency.[129]

Absent an explicit Congressional intent to preempt every aspect of a subject field, courts are often left the task of determining the extent of federal preemption.[130] The examination is often an inquiry into whether Congress intended that the subject matter of a field be governed by a uniform, national system or by localized, domestic control.[131] Additional factors that may be determinative when assessing the Congres-

126. THE FEDERALIST NO. 32, at 241 (Alexander Hamilton) (B. Wright ed., 1961), *quoted in* Goldstein v. California, 412 U.S. 546, 552-53 (1972).

127. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479 (2d ed. 1988).

128. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983).

129. *See id.* at 204. The Supreme Court uses the following test to determine whether a state law is preempted:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

130. JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION 113-14 (1991).

131. *Id.* at 114.

sional purpose are whether a diversity of conditions exists geographically which affects the subject field, and whether the limited capacity of the federal government to monitor local developments makes total preemption impracticable.[132]

### B. Preemption and Copyright

The Copyright Clause[133] grants Congress the power to enact national legislation for the protection of artists and authors. Historically, Congress has shared this authority with the states.[134] In *Goldstein v. California*,[135] this sharing of power was called into question before the U.S. Supreme Court. At issue was whether federal copyright law preempted a California criminal statute prohibiting unauthorized duplication of sound recordings. The Court held that the states retain the power to regulate copyright protection if no conflict exists with federal law. The Court analogized to the constitutional grant of commerce power and determined that Copyright law was governed by similar principles. The *Goldstein* Court thus incorporated the reasoning of *Cooley v. Board of Wardens*[136] into the field of copyright preemption: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[137] The *Goldstein* Court reasoned that because the subject matter of copyright may be of purely local importance and unprotected by the federal statute, no "unyielding national interest" required the states to relinquish power to exclusive federal control.[138] Chief Justice Burger, in his opinion for the majority, stated, "Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded."[139]

132. *See id.* at 136; *see also* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); TRIBE, *supra* note 127, § 6-4, at 407 ("[T]he enduring legacy of *Cooley* has been this basic theme: The validity of state action affecting interstate commerce must be judged in light of the desirability of permitting diverse responses to local needs and the undesirability of permitting local interference . . . .").

133. U.S. CONST. art. I, § 8, cl. 8 (granting power to the Congress "[to] promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

134. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) (acknowledging the validity of state common law copyright).

135. 412 U.S. 546 (1973).

136. 53 U.S. (12 How.) 299 (1851).

137. *Id.* at 319.

138. *Goldstein*, 412 U.S. at 558.

139. *Id.* at 556-57.

Further, the Court determined that the California statute was not void under the Supremacy Clause. Because the case was decided under the 1909 Copyright Act, which did not protect sound recordings, the Court found that federal law had left this area unattended through inaction.[140] Therefore, the California statute did not transgress the standard established in *Hines v. Davidowitz*[141]: "whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[142]

### C. The Question of Statutory Construction

Congress amended 17 U.S.C. section 301 to add a preemption provision to the Visual Artists Rights Act. As drafted,[143] this provision poses some complex questions of statutory construction in relation to existing state moral rights statutes. For example, "equivalent rights" are preempted;[144] however, nowhere is this term defined. Similarly, rights "with respect to works of visual art to which the rights conferred by section 106A apply"[145] are preempted, but works which are specifically excluded by the Act may be eligible for protection under state law. Further, it is unclear whether preemption is appropriate if a technical defect, such as the omission of a number on a limited edition print, prevents a work from coming within the Act's parameters. Additionally, no provision is made for choice of law if protection is continued after an artist's death by virtue of state law.[146] The answers to these questions will determine whether artists in some states will receive less protection under the Act than they had previously enjoyed under preexisting state moral rights statutes.[147]

Such ambiguity is not only undesirable as a practical matter, but it also conflicts with the arguments made in favor of the Act's passage. When Congress considered the bill, proponents noted that in California, where analogous protection existed, a "blizzard of litigation" has not ensued.[148] Testimony at the subcommittee hearings indicated that this was due in part to the clarity of the California Arts Preservation Act; under

140. *Id.* at 570.
141. 312 U.S. 52 (1941).
142. *Id.* at 67 (citation omitted).
143. *See supra* note 121 for text of 17 U.S.C. § 301(f) (Supp. 1991).
144. 17 U.S.C. § 301(f)(1).
145. *Id.*
146. 4 MELVILLE & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.21[B] (1991).
147. Damich, *supra* note 119, at 972; 4 NIMMER, *supra* note 144, § 8.21[B].
148. *Senate Hearings, supra* note 16, at 142.

California law, both parties had sufficient knowledge to decide whether to comply with the Act, settle, or proceed with a lawsuit.[149]

### D. Approaches to Preemption

Several possible interpretations of the preemption provision exist. The provision does not seem to evidence Congressional intent to preempt all state laws completely, at least with respect to protection during the artist's lifetime.[150] The Act provides: "Nothing . . . shall annul or limit any rights or remedies under the common law or Statutes of any state with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the rights conferred by [the Act] with respect to works of visual art."[151] Under *Goldstein v. California*, state laws are not void under the Supremacy Clause where the area sought to be regulated by the state is left unattended by federal law and no actual conflict exists.[152] Because the Act does not encompass the breadth of all moral rights protection, and because the purposes of the Act can be accomplished concurrently with state moral rights legislation, no constitutional barriers appear to prevent concurrent federal and state regulation of moral rights. In light of the express language of the Act and the lack of a constitutional barrier, the preemption provision appears to allow some measure of state moral rights legislation.[153]

#### *1. Nimmer's View*

Professor Nimmer's treatise suggests one possible interpretation: "Construction of this provision should follow the general jurisprudence of copyright preemption"[154] as it exists under the 1976 Copyright Act ("1976 Act"). Although Nimmer's analysis is consistent with a sound general rule of statutory construction that "all legislation must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment,"[155] this solution may raise more problems than it solves.

149. *Id.*

150. *See* 17 U.S.C. § 301(f), *supra* note 121.

151. 17 U.S.C. § 301(f).

152. 412 U.S. 546, 570 (1973).

153. The Committee stated:

> Consistent with current law on preemption for economic rights, the new Federal law will not preempt State causes of action relating to works that are not covered by the law, such as audiovisual works, photographs produced for non-exhibition purposes, and works in which the copyright has been transferred before the effective date.

H.R. REP. NO. 514, *supra* note 17, at 21.

154. 4 NIMMER, *supra* note 146, § 8.21[B], at 292.

155. 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 421 (1984). This treatise also states: "The legislature is presumed to know the prior construc-

The general jurisprudence of copyright preemption under the 1976 Act requires that two conditions be satisfied before preemption will occur: 1) the work in question must be within the subject matter of copyright as defined under the copyright code; and 2) the right created under state law must be equivalent to any exclusive copyrights as defined in the copyright code.[156] Judicial interpretation of these requirements has been the subject of conflicting analysis. As many as five different tests are in use to determine whether a right is an "equivalent right."[157] Given the current morass of varying interpretations, it is unlikely that a "general jurisprudence" is truly definable. Furthermore, using the construction of the pre-existing provision would likely result in a very broad reading of the Act's preemption section.

Regarding the first prong, courts have found that state law is preempted under the 1976 Copyright Act because of the work's failure to meet the technical requirements for protection.[158] As stated by one court,

> Were this not so, states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of material not meeting federal statutory standards. That interpretation would run directly afoul of one of the [1976 Copyright] Act's central purposes, to "avoid the development of any vague borderline areas between State and Federal protection."[159]

For example, in *Mayer v. Josiah Wedgewood & Sons, Ltd.*,[160] the court found that the design of a glass Christmas tree ornament continued to be within the subject matter of the 1976 Act, and therefore state law was preempted. However, the court found that because the work was

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tion of the original act or code and if previously construed terms in the unamended sections are used in the amendment, it is indicated that the legislature intended to adopt the prior construction of those terms." 1A SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 296 (1984).

156. Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 135 (S.D.N.Y. 1990). The analysis will be similar under the Visual Artists Rights Act. H.R. REP. NO. 514, *supra* note 17, at 21. The fundamental question is how broadly the preemption question should be construed in a given factual situation.

157. Patrick McNamara, Note, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301*, 24 B.C. L. REV. 963, 984 (1983).

158. The Committee stated:

> As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.

H.R. REP. No. 1476, 94th Cong., 2d Sess. 131 (1976), *reprinted in* 17 U.S.C. § 301 (1988). *See also* 1 NIMMER, *supra* note 146, § 1.01[B].

159. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

160. 601 F. Supp. 1523 (S.D.N.Y. 1985).

within the public domain, the design was outside the protection of the U.S. Copyright Act, and dismissed the claim.

Preemption is similarly broad under the second prong of the analysis. In the determination of whether a state offers a right "equivalent" to federal law, courts find that state law is preempted even if the "precise contours" of state and federal law differ.[161] Perhaps the most prominent test in this area dictates that this prong of the test is satisfied when an underlying factual predicate which would constitute a valid state law claim violates any of the rights set forth in the 1976 Act.[162] The state law is not preempted, however, where a valid claim must state an extra "element" which is not a requirement for recovery under the Copyright Act.[163] For example, a claim for the breach of a trade secret requires proof of "secrecy"; this "extra element" prevents its preemption by the Copyright Act.[164] Under the "extra element" test, state law claims for unjust enrichment, unfair competition, and misappropriation have all been held preempted because they involved rights equivalent to copyright.[165]

*Del Madera Properties v. Rhodes & Gardener, Inc.*[166] well illustrates the application of the "extra element" test. In *Del Madera*, the court found that a claim for unjust enrichment did not require proof of an "extra element" beyond those required for a copyright claim. To reach this determination, the court examined the underlying factual predicate: the plaintiffs alleged that the defendants had violated an implied promise not to use a map for which the plaintiffs owned a valid copyright.[167] Rejecting the argument that requirements for proof of an implied promise provided the "extra element" needed to separate this claim from a copyright claim, the court stated that "an implied promise not to use or

161. 1 NIMMER, *supra* note 146, § 1.01[B].

162. Baltimore Orioles v. Major League Baseball Players, 805 F.2d 663, 676-77 (7th Cir. 1986).

*See also* Howard B. Abrams, *Copyright, Misappropriation and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 556 ("A functional approach is to examine the impact and effect of the right asserted at state law and its remedy. If the effect is to place the defendant under the same kind of restrictions from copying and use as would the copyright laws, then the right is preempted.").

163. A cause of action for copyright infringement requires: 1) that a work be protected by copyright; 2) that the plaintiff owns the copyright; and 3) that the copyright was infringed by the defendant's acts of reproduction, performance, distribution, or display. If a state right contains a different characteristic that must be proven, then an "extra element" exists and state law is not preempted. *See* SBK Catalogue Partnership v. Orion Pictures, 723 F. Supp. 1053, 1066 (D.N.J. 1989).

164. 1 NIMMER, *supra* note 146, § 1.01[B].

165. Del Madera Properties v. Rhodes & Gardener, Inc., 820 F.2d 973, 976 (9th Cir. 1987).

166. *Id.*

167. *Id.* at 975.

copy materials within the subject matter of copyright is equivalent to protection provided by [the Copyright Act]."[168]

Similarly, in *Baltimore Orioles v. Major League Baseball Players*,[169] a case which examined baseball players' rights in the unauthorized broadcast of their performance at games, the court determined that federal copyright law preempted the right of publicity. The court found that fixing the players' performance in a "tangible medium of expression"[170] by recording the game via television cameras satisfied the originality requirement, bringing the work within the subject matter of copyright.[171] Because the telecast of the games also constituted the reproduction and distribution[172] of protected subject matter, violation of the right of publicity violated an "equivalent right" under copyright law; thus preemption was proper.[173]

Applying a similar test in the context of moral rights would result in extensive preemption of existing state law. For example, in *Wojnarowicz v. American Family Association*,[174] the court determined that the defendant had violated the New York Authorship Rights Act by mailing pamphlets containing reproductions of the plaintiff's artwork which were so cropped that a viewer would be misled as to their communicative and artistic message.[175] Similar to the Visual Artists Rights Act, the New York Authorship Rights Act protects the reputation of an artist by preventing the display or distribution of a work of fine art, or a reproduction thereof, in an altered or modified form.[176] *Wojnarowicz* concerned an unsigned reproduction of the artist's work, which is not explicitly covered by the Visual Artists Rights Act. Because this "work of fine art" does not meet the technical specifications of the Act, it is unclear whether the artist's rights would be preempted by federal law. Similarly, because the plaintiff must prove that the defendant published or displayed the work in addition to proving its modification, this "extra element" could prevent preemption. However, a broad reading of the Act, such as that used by the *Baltimore Orioles* court, could allow preemption because the subject matter concerns a work of fine art and because the

168. *Id.* at 977.

169. 805 F.2d 663 (7th Cir. 1986).

170. Copyrightable subject matter is comprised of "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102 (West 1977).

171. *Baltimore Orioles*, 805 F.2d at 674-75.

172. Both reproduction and distribution are protected rights. 17 U.S.C. § 106 (1988).

173. *Baltimore Orioles*, 805 F.2d at 676-79.

174. 745 F. Supp. 130 (S.D.N.Y. 1990), discussed in text, *supra* note 68.

175. *Id.* at 136-39.

176. N.Y. ARTS & CULT. AFF. LAW § 13.03 (McKinney Supp. 1988).

violation of the New York Authorship Rights Act also violates the moral right of the artist.[177]

Application of the jurisprudence of the 1976 Act to the newly enacted Visual Artists Rights Act is unwarranted, because the 1976 Act was enacted at a different time for an entirely different purpose. The 1976 Act articulated a balance between the interests of authors in original works and the public interest in access to ideas and information.[178] To take a concrete example, if the 1976 Act permitted works to fall into the public domain too quickly, authors would not have sufficient incentive to produce new, high-quality work. On the other hand, if the 1976 Act provided more extended protection, other prospective authors would be inhibited both by a lack of source material and a danger of inadvertent infringement. Moral rights protection, which was instituted to shield the right of the artist's personality and to preserve an artifact for future generations, does not involve these same justifications.

Perhaps more importantly for the question of preemption, the purpose of the 1976 provision was to abolish the common law system of protection for unpublished works. The 1976 Act's committee notes stress "its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."[179] In contrast, the legislative history of the Visual Artists Rights Act specifically states that rights such as misattribution and resale royalty were not to be preempted.[180] This may indicate that a more cautionary approach was intended. Because this preemption section is tailored to the Visual Artists Rights Act, the better solution may be to apply the following rule: If a section refers to another whole statute, the section should be read in connection with the statute to

177. Professor Nimmer has also suggested that all "artworks" in the lay sense may be subject to preemption, arguing that "it would be ironic for such unqualifying works to claim possibly greater protection under state law than qualifying works receive under the Visual Artists Rights Act of 1990 itself." 4 NIMMER, *supra* note 146, § 8.21[B], at 290. This view would be consistent with that of the court in Mayer v. Josiah Wedgewood & Sons, Ltd., 601 F. Supp. 1523 (S.D.N.Y. 1985), discussed in text, *supra* note 160.

178. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1292-93 (1991).

179. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 17 U.S.C.A. § 301 (West Supp. 1991).

Admittedly, the legislative history does not control the construction of a statute. *See* 2A SINGER, *supra* note 155, at 284 ("Basing decisions of statutory interpretation on historical events that are, practically speaking, obscured from the awareness of persons not directly involved in the legislative process has the character of enforcing secret laws."). However, it has often been said that legislative history may be the most useful indication of congressional intent for recently enacted statutes. *See, e.g.*, Brock v. Writers Guild of America, 762 F.2d 1349, 1353 (9th Cir. 1985) ("In construing a statute in a case of first impression, we look to the traditional signposts of statutory construction: first, the language of the statute itself; second, its legislative history.") (citing Heckler v. Turner, 470 U.S. 184 (1985)).

180. H.R. REP. NO. 514, *supra* note 17, at 21.

which it refers.[181] For the foregoing reasons, applying the decisional law of a preexisting, but unrelated, provision is inappropriate.

*2. Damich's View*

Professor Edward Damich proposes an alternative solution. Damich argues that where both state and federal moral rights statutes are at issue, narrow preemption under the Act is justified, permitting artists to retain the maximum moral rights protection.[182] Damich points out that, under the plain meaning of the statute, only those rights which "exactly correspond" to rights under the Act should be preempted.[183] Although he acknowledges that the term "equivalent right" has historically allowed for broader judicial construction,[184] Damich draws an inference from the absence of certain language.[185] He notes that the 1976 Act expressly preempted rights "within the general scope of copyright."[186] The absence of such language in the new provision, in Damich's view, justifies a narrow reading.[187]

Damich further argues that in adopting the Berne Implementation Act, Congress relied upon state moral rights statutes to establish that the United States currently met Berne requirements.[188] Damich reasons that "nonpreemption is consistent with the intent of Congress, which relied on the state statutes in concluding that the United States complied sufficiently with article 6*bis* to join the Berne Convention."[189] However, Congress' own justification seems artificial; as only eleven out of fifty states offer any form of moral rights protection, some of which may not comply with Berne, it is doubtful whether this minimal participation truly brought the United States within Berne compliance. Furthermore,

181. *See* 1A SINGER, *supra* note 155, at 296.

182. Damich, *supra* note 119, at 972-73.

183. *Id.* at 972.

184. *Id.*

185. *Id.* at 973.

186. *Id.* at 973 n.147.

187. *Id.* at 973. Although this argument is persuasive, it is equally plausible that "within the general scope" was simply meant to substitute for the enumeration of the many copyright provisions contained throughout Title 17. Its absence in the recent amendment may be due to the fact that specific reference to the Visual Artists Rights Act makes the broader language unnecessary.

188. *Id.*

189. *Id.* Professor Damich further proposes that a former version of the preemption provision of the Act is preferable. This provision did not preempt state moral rights protection under common law or statute as long as the state statute did not diminish or prevent the exercise of the federal moral right under the bill. *Id.* at 972. Thus, the federal statute would become the "floor" of moral rights; a state could offer more protection if desired. *Id.* at 947-48.

it can be argued that today state laws are no longer necessary for Berne compliance due to the Act's passage.

*3. Zuber's View*

In contrast, commentator Joseph Zuber advocates broader preemption.[190] Assessing the impact of the Act on California's and New York's moral rights statutes, Zuber concludes that preemption is proper where state law generally protects interests similar to those protected under federal law.[191] For example, Zuber states that California's Art Preservation Act is almost entirely preempted for actions brought by the artist during his lifetime.[192] Zuber points out that the rights conferred by the California statute are "essentially identical" to those under the Act, and, relying upon the Act's legislative history, proposes that preemption is likely.[193] However, Zuber asserts that one aspect of the New York Authorship Rights Act significantly differs from the Act and may therefore survive preemption[194]: the New York Act permits an artist to disavow authorship of a reproduction of his work for a just and valid reason, while the Visual Artists Rights Act expressly excludes this right as applied to reproductions.[195] Because the Act's legislative history expressly states that the right to disavow a reproduction is not "equivalent" to a federal right, Zuber maintains that preemption is not proper.[196]

On the other hand, regarding the right of integrity, Zuber argues that the New York Act "provides no substantive protection in this area that is not provided under the 1990 Act."[197] The New York Act states:

> No person other than the artist . . . shall knowingly display in a place accessible to the public or publish a work of fine art or limited edition multiple of not more than three hundred copies by that artist or a production thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist . . . and damage to the artist's reputation is reasonably likely to result therefrom . . . .[198]

It is perhaps not entirely clear that the New York Act is "narrower"[199] than the Act. For example, it would seem that the New York Act would permit recovery where a defendant was negligent in the act of

190. Joseph Zuber, *The Visual Artists Rights Act of 1990—What it Does, and What it Preempts*, 23 PAC. L.J. 445 (1992).
191. *Id.*
192. *Id.* at 498-99.
193. *Id.*
194. *Id.* at 503-04.
195. *Id.* at 503.
196. *Id.* at 503-04.
197. *Id.* at 504.
198. N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1992).
199. Zuber, *supra* note 190, at 504.

modification, so long as the defendant "knowingly display[ed]" the work. The federal Act does not permit recovery where the defendant was negligent in the act of modification, regardless of the defendant's state of mind when displaying the work. In this respect, Zuber's analysis reflects the inherent problem in applying this provision: the Visual Artists Rights Act is vague regarding preemption.

Zuber's arguments regarding broad preemption rely primarily upon the committee's comments.[200] It is debatable, however, whether much guidance can be drawn from the sparse comment. Although the Act's legislative history may offer some useful guidance about preemption,[201] the Committee Report leaves numerous and important issues unaddressed.

## IV
## A Proposed Solution

Copyright preemption, as governed by *Goldstein*, allows for the exercise of concurrent power so long as state law does not conflict with federal law. Consistent with these constitutional principles, preemption is appropriate only if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[202] Therefore, the key question under *Goldstein* is to what degree, if at all, states' moral rights protection may extend to areas "left unattended" by federal law. Since it is difficult to see that any fundamental conflict exists as a practical matter, artists in states already offering moral rights legislation should be able to seek protection under those laws. States should be able to continue to experiment with moral rights protection, so that experience gained at the local level might be considered for later nationwide adoption. Similarly, a state with a local preference for giving extra protection to its creators of applied arts, as distinguished from fine artists, should be permitted to do so. As the Court stated in *Bonito Boats v. Thunder Craft Boats*,[203] "Where 'Congress determines that neither federal protection nor freedom from restraint is required by the national interest,' the States remain free to promote originality and creativity in their own domains."[204] In the Act, Congress has expressed no "unyield-

200. *Id.*

201. Although the use of legislative history for discerning the legislative purpose of a statute for preemption purposes is routine, scholarly criticism casts doubt on this practice. *See* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992) (author questions the constitutionality and soundness of consulting legislative history for interpretation).

202. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

203. 489 U.S. 141 (1989).

204. *Id.* at 165 (quoting Goldstein v. California, 412 U.S. 546, 559 (1973)).

ing national interest" that would require states to relinquish all authority to federal law in moral rights protection.

It can be argued that the legislative history indicates that one Congressional purpose of the Act was to provide a uniform system of protection of an artist's reputation and creative works.[205] As the Register of Copyrights noted, "[a] single Federal system is preferable to State statutes or municipal ordinances on moral rights because creativity is stimulated more effectively on a uniform, national basis."[206] However, to infer that uniformity is a necessary corollary to the Act's substantive protection is a debatable proposition. Furthermore, it is unlikely that the substantive goals of the Act are relevant to the preemption analysis. As stated by the U.S. Supreme Court in *Cipollone v. Liggett Group*,[207]

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides "a reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.[208]

Where the Act has left certain areas of moral rights protection unattended, the express language of the preemption section as approved by Congress permits state moral rights regulation. According to section 301(f), all rights that are equivalent to the rights granted in the Act are preempted "with respect to works of visual art to which the rights conferred by section 106A apply."[209] According to this language, the Act must confer an equivalent right on a "work of visual art"[210] before state law is preempted. However, states should be able to protect media completely unaddressed by the Act. For example, a state should be permitted to protect works of applied art. If in the interest of fostering local creativity, Pennsylvania seeks to extend moral rights protection to work made by fine furniture makers, such a statute would not likely "stand[ ]

205. H.R. REP. No. 514, *supra* note 17, at 21.

206. *Id.* Although probably not every artist would embrace that proposition, it is plausible that art purchasing is stimulated more effectively by a clear indication of prospective parties' rights. For example, attorney Peter Karlen, in his statement to the Senate subcommittee, stated that, "An artist shipping works in interstate commerce should not have to worry about conflict of laws or the vagaries of various state laws in order to determine what her rights are." Mr. Karlen cited the example of two of his clients who had shipped work interstate which was destroyed in transit. Considerable problems arose when it could not be determined where the destruction took place, which would have determined which state's law would apply. *Senate Hearings*, *supra* note 16, at 99.

207. 112 S. Ct. 2608 (1992).

208. *Id.* at 2618 (citations omitted).

209. 17 U.S.C. § 301(f).

210. The term "work of visual art" is defined in 17 U.S.C. § 101. *See* note 95, *supra*.

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[211]

Perhaps more controversial is whether works specifically excluded under the Act are "left unattended by federal law." Arguably, because section 106A does not confer rights on excluded works, states retain "the implied reservation of power to fill out the scheme."[212] As the Supreme Court has stated, "the case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.' "[213] On the other hand, one might argue that Congress intended that certain works never receive moral rights protection.[214]

Nevertheless, state protection of works that are excluded by the Act is consistent with Supreme Court precedent. First, Congress has not expressly preempted states' moral rights legislation for excluded works. Second, because section 301 provides that state law is not annulled or limited regarding nonequivalent rights with respect to works of visual art, there is no Congressional "intent to occupy a given field."[215] Third, the purposes of both state and federal moral rights statutes do not conflict: both protect the right of personality of the artist as embodied in a work. Although some states may place more emphasis upon the reputation of the artist compared with the preservation of the work,[216] neither of these two goals is in conflict with the Act, which is intended to "protect both the reputations of certain visual artists and the works of art they create."[217]

Section 301 preempts state laws that are "equivalent" to those conferred under the Act without providing any guidance as to when one right may be considered "equivalent" to another.[218] Because it appears

211. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

212. Tousey v. North Am. Van Lines, Inc., 752 F.2d 96, 102 (4th Cir. 1985) (where a federal agency declines to regulate an area, states have the power to enact laws so long as no conflict with federal power exists) (citation omitted).

213. Bonito Boats v. Thundercraft Boats, 489 U.S. 141, 166-67 (1989) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984)).

214. *Cf.* KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922, 934-36 (5th Cir. 1983) (where Congress specifically regulated rates charged by broadcasters to political candidates, state law could not proscribe more favorable rates; state law would impermissibly invalidate the purpose of the federal law).

215. *Silkwood*, 464 U.S. at 248.

216. As reflected in their popular names, the California Art Preservation Act and the New York Authorship Rights Act have been seen as having dissimilar goals. *See* Edward J. Damich, *The New York Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1746-47 (1984).

217. H.R. REP. NO. 514, *supra* note 17, at 5.

218. 17 U.S.C. § 301(f).

that no judicial interpretation of section 301 exists as of the time of publication,[219] no definitive answer is available. One solution would follow the guidance of the French system of artist's protection. Under that analysis, a legally protectible interest analogous to *droit moral* would be considered "equivalent" to moral rights conferred by the Act. However, because the Act does not confer an equivalent right to *droit de suite*, which protects the economic interest in the rise in value of work, resale royalty provisions of state statutes should remain in effect.[220]

Additionally, state laws should be allowed to give protection to work during time periods not covered by the Act. For works created but not sold until after June 1, 1991, rights conferred by the Act "expire at the same time as the rights conferred by [the 1976 Copyright Act]."[221] The 1976 Act expires fifty years after the author's death.[222] The Act therefore indicates that federal law continues in force during this fifty-year time period. State laws that confer protection beyond the fifty-year span or that eliminate the requirement that the work be created but not transferred before June 1, 1991, should not be preempted. Section 301 does not limit "any rights or remedies under the . . . statutes of any State" where an equivalent has not been conferred by the Act.[223]

The plain meaning of the preemption section appears to dictate these results. As Professor Laurence Tribe has stated,

> Above all, perhaps the most fundamental point to remember is that the preemption analysis is, or should be, a matter of statutory construction

219. As of the time of publication, this author has discovered only one case that has considered the preemption issues generated by the Act. In Gegenhuber v. Hystopolis Prods., Inc., No. 92 C 1055, 1992 U.S. Dist. LEXIS 10156, at *1 (N.D. Ill. July 10, 1992). the court considered whether the Act preempted a state statute granting injunctive relief for deceptive trade practices. The case involved two plaintiffs who created, designed, and directed the original theatrical performance of a puppet show. After the plaintiffs left the theater company, the defendants produced another run of the play without giving full credit to the plaintiffs. Because the court found that the work was not within the scope of works protected by the Act's right of attribution, the plaintiffs' claims were not preempted. *Id.* at *12. The court acknowledged that the puppets, costumes and sets could conceivably be considered "visual art" under the Act, but refused to read protection into section 301 absent express language by Congress. *Id.* at *11-12. The court stated:

> We will not read into the VARA that which Congress has evidently chosen to leave out, for, having included extensive categories of works that do or do not constitute "visual art," Congress could have included works such as puppets, costumes and sets if it desired to afford them the protections of section 106A.

This result appears consistent with *Goldstein* and the plain language of the preemption provision. *Gegenhuber*, however, is an "easy case" because theatrical productions are clearly unprotected under the Act. Moreover, the Illinois Deceptive Trade Practices statute does not confer a moral, and therefore "equivalent," right.

220. For a discussion of *droit de suite*, *see supra* note 32 and accompanying text.

221. 17 U.S.C. § 106A(d)(2) (Supp. 1991).

222. 17 U.S.C. § 302 (1988).

223. 17 U.S.C. § 301(f).

> rather than free-form judicial policymaking . . . . [I]t is one thing to pursue a specialized approach unless and until Congress says something to overturn it, and something else again to approach preemption issues generally as though one were doing something other than reading an applicable federal statute.[224]

Following the legislature's express language will not only provide those parties who must ultimately comply with the Act a better awareness of their obligations, but it will also permit states to make independent decisions regarding the scope of moral rights within their borders.

## V
## Conclusion

The Visual Artists Rights Act provides needed protection for intellectual property in the United States. Moral rights under the Act, however, are limited in comparison with moral rights protection in some states and in other countries. The expansion of artists' protection may depend upon the Act's viability and the ability of states to continue to experiment with moral rights legislation. Additionally, the Act may serve as the basis for moral rights expansion into other areas of intellectual property law.

The preemption provision, although troublesome to interpret, should permit state regulation of moral rights that have been "left unattended by federal law." This section should be interpreted according to its language in light of Supreme Court precedent. As written, Congress has expressed no "unyielding national interest" which prevents states from legislating moral rights in areas unregulated by the Act.

224. TRIBE, *supra* note 127, § 6-30, at 510-11.